IN THE

# Supreme Court of the United States.

October Term, 1956.

No. 839.

DANIEL DUGAN, A MINOR, BY HIS PARENTS AND NATURAL GUARDIANS, DANIEL DUGAN AND HELEN DUGAN, HIS WIFE; AND DANIEL DUGAN AND HELEN DUGAN, HIS WIFE, IN THEIR OWN RIGHTS,
*Petitioners,*

*v.*

THE PENNSYLVANIA RAILROAD COMPANY,
*Respondent.*

## PETITIONERS' REPLY BRIEF.

This Brief is submitted in reply to Respondent's Brief in opposition to Petition for Writ of Certiorari.

## ARGUMENT.

### I.

Respondent's first argument can only be characterized as ridiculous. The federal constitutional question here raised was not presented by the case until after the promulgation of the opinion of the Supreme Court of Pennsylvania which ignored the basic issue involved. Obviously, no federal constitutional question could have been raised by

petitioners before such a constitutional question existed. As soon as it did exist it was raised by a timely motion for re-argument which explicitly apprised the court below of the federal constitutional question it had created in promulgating its opinion (47a, 49a).

In seeking to justify its position, respondent argues that petitioners should have anticipated that the Supreme Court of Pennsylvania would decide this case without regard to the constitution. We are confident that on these facts this Court would place no such insuperable obstacle in the path of a litigant who was successful until the court of last resort of his state, by ignoring the real issue in the case and then denying petitioners a re-hearing on that undecided issue, adjudicated the case against him in flagrant violation of constitutional mandates. The behavior of the court below is so extraordinary and shockingly violative of petitioners' fundamental federal constitutional rights that not even a prophet could have anticipated it. It is precisely because of that that this Petition is brought and should be granted.

## II.

Realizing that a ruling by the Supreme Court of Pennsylvania bottomed on material *de hors* the record to the effect that there was no liability because the Pennsylvania Railroad had 275 miles of track which would be too burdensome to fence would be a ruling denying petitioners a hearing and adjudication of the real issue, respondent attempts to say that this was not the grounds of the opinion. We are willing to rest our case for the grant of certiorari on our reading of the opinion, for it cannot be doubted that the Supreme Court of Pennsylvania decided this case for exactly that reason.

This case presents a substantial federal constitutional question for if the court of last resort in any state may take away a jury verdict and a lower court judgment by injecting into its decision material *de hors* the record and then using

that material to render a judgment on a false issue, leaving the only real issue undecided, it is just as destructive of constitutional rights as allowing a jury verdict to stand which decides an issue not in a case on material *de hors* the record and leaves the real issue undecided.

The sum of the error below is this: the federal constitutional guarantees involved in this and every litigation in the United States command that courts and juries discharge their solemn duties to citizens who come before them. The trial court and jury in this case did. The Supreme Court of Pennsylvania did not, and in refusing to do so it denied petitioners due process of law. Petitioners' rights have thus been cast into a Kafka-like oblivion.

## CONCLUSION.

The Petition for Certiorari should be granted.

Respectfully submitted,

B. Nathaniel Richter,
Charles A. Lord,
Seymour I. Toll,
Richter, Lord & Levy,
*Counsel for Petitioners.*

Lois G. Forer,
*Of Counsel.*